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748-244—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 372

SAMUEL J. MARROSO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 471

JOHN JACOB SAMARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 331 F. 2d 601 (Pet. No. 372, App. B; Pet. No. 471, App. A).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1964. Petitions for rehearing were de-

nied on July 8, 1964. On August 11, 1964 Mr. Justice Black extended the time for filing a petition for a writ of certiorari in No. 372 until August 14, and the petition was filed on August 11. On August 4, 1964 Mr. Justice White extended the time for filing a petition in No. 471 until September 7 (Labor Day) and the petition was filed on September 8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the verdict (No. 471).

2. Whether there was any violation of petitioners' rights under the Fifth or Sixth Amendments, or under 18 U.S.C. 3481, when an F.B.I. agent, testifying in detail as to an interview he had conducted with petitioner Marroso, stated that Marroso had terminated the interview on advice of counsel (Nos. 372 and 471).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to transport counterfeit securities in foreign commerce in violation of 18 U.S.C. 2314, and of a substantive violation of the same statute. Petitioner Samarin was sentenced to five years' imprisonment on both counts, the sentences to run concurrently. Petitioner Marroso was sentenced to three years' imprisonment on the conspiracy count and was placed on probation for three years on the substantive count. The court of appeals affirmed *per curiam*.

The evidence may be summarized as follows:

Some time during the summer of 1960, petitioner Samarin went to the office of a stockbroker in Cleveland and requested an Ohio Turnpike bond in "street form," explaining that he had an opportunity to make "big money"; that he wished to counterfeit the bond; that the counterfeit bonds would be used by a South American banker to replenish an estate some of whose funds had been loaned to a union in Detroit; and that after the estate had been audited and the union had repaid the loan, the bonds would be destroyed and never go into circulation (R. 71–73, 99, 106).

Samarin obtained one genuine Turnpike bond in October, 1960 (R. 361–364, 439–441). Thereafter he approached three printers and asked them if they could print "certificates" or "bonds", having specified certain characteristics which corresponded to those of the genuine Turnpike issue (R. 164, 174–175, 185, 513–514, 525–526). He told one printer "It's a little shady" (R. 165).

Petitioner Marroso was from Detroit and had authority over or access to funds of the Teamsters' Union (R. 230, 263, 399). He and Samarin had been seen together in June, 1960 at Samarin's residence (R. 397–398, 401–402). During the last week of 1960, Hyman Green, an acquitted co-defendant in this case, gave his friend Martin Von Zamft, president of the Bank of Miami Beach, a list of 265 or 266 Ohio Turnpike bonds and requested that he ascertain whether those bond numbers were free of claims (R. 219–224). Green, who was the director of a bank in Nassau, Bahamas, told Von Zamft that the owner of

the bonds wanted them sold through Green's Nassau bank (R. 225, 247). Later the same week, Green and petitioner Marroso left 266 Ohio Turnpike bonds with Von Zamft for safekeeping (R. 233–236, 243, 245). On January 3, 1961, an employee of the Bank of Miami Beach made telephone inquiries with regard to the bond numbers specified by Green, and learned that five of them had previously been cancelled (R. 60–66, 223–224, 333, 337, 345). On the same day, January 3, a telephone call was made from petitioner Marroso's Miami hotel room to a party named "Samarin" in Cleveland (R. 391). The telephone number called from Miami was that of a house in a Cleveland suburb, and it was established that Samarin was residing there at the time of the call (R. 395–396).

On January 9, Von Zamft returned the 266 Turnpike bonds to petitioner Marroso in Miami; the same day Marroso, arriving in Nassau, handed a package to Green (R. 276, 288, 290, 298–299). The Nassau bank of which Green was a director handled several "X" or confidential accounts, one of which was utilized in the negotiation of some of the counterfeit bonds at issue here (R. 249–250, 294–296, 313–315).

Within three days of Marroso's trip to Nassau, he and Green took 265 Turnpike bonds to a broker's office, where a sale was negotiated (R. 299–303, 321). The bonds were shipped to New York purchasers, who discovered that they were counterfeit (R. 125, 149, 191–192, 312). The bonds sold in Nassau did not include the five numbers which, upon the inquiry previously instigated by Green, were found to have

been cancelled (R. 312, 355). All the counterfeits had been made from the genuine bond which Samarin possessed in October (R. 514–521, 524, 532).

After newspapers had publicized the negotiation of certain counterfeit Ohio Turnpike bonds, petitioner Samarin approached the broker to whom he had originally mentioned the counterfeiting proposal and told him that the "deal" had not gone through (R. 77).

Petitioner Marroso, questioned by an F.B.I. agent, denied ever having had possession of any Ohio Turnpike bonds, genuine or otherwise, and stated further that he knew of no one who had such bonds. He denied having attended any meetings with Green in Nassau and declared that he could not recall whether he had seen Green in Nassau or in Miami (R. 445–446).

ARGUMENT

1. Contrary to petitioner Samarin's contention, there was substantial evidence to support the jury's finding that the forged bonds were transported to Nassau and that he, Samarin, was implicated in that transportation. As we have shown, the record established that about two weeks prior to the sale of the counterfeit bonds in Nassau, Green asked a Miami banker to check out a list of 265 or 266 Ohio Turnpike bearer bonds in the "132,000" series (R. 342); that, shortly afterward, Green and Marroso deposited 266 Ohio Turnpike bearer bonds with a Miami banker for temporary safekeeping; that on January 9, 1961, the very day these bonds were returned to Marroso, he flew to Nassau and there handed a package over to Green; that within two days Green and Marroso

had begun negotiations for the sale of 265 Ohio Turnpike bonds; and that on January 13, 1961, four days after Marroso's receipt of the 266 bonds in Miami and his flight to Nassau, the counterfeit bonds here at issue, all belonging to the "132,000" series, were sold to New York purchasers. In these circumstances, the jury could readily find that the forged bonds sold by Green and Marroso had been transported by Marroso from Miami to Nassau.

Samarin's participation is also inferable from the record. It was shown that Samarin had sought to obtain an Ohio Turnpike bond for the declared purpose of counterfeiting it; that he did manage to secure such a bond and approached three printers with a view to duplicating its characteristics; that the counterfeit bonds sold by Marroso and Green in Nassau were forged copies of the model bond procured by Samarin; that Samarin and Marroso had been seen together and had engaged in business discussions on at least two occasions during the months preceding the sale of the bonds; and that Marroso in Miami had placed a telephone call to Samarin in Cleveland only a few days before the transportation of the bonds to Nassau. In addition, the proposed counterfeiting scheme, as described by Samarin to a Cleveland stockbroker, involved a South American banker and a Detroit union, and the evidence showed that Marroso, who lived in Detroit, was connected with the Teamsters Union and collaborated in the sale with Green, a Nassau banker. From these facts the jury could reasonably conclude that Samarin was an accessory to the illegal transportation.

2. The F.B.I. agent who interviewed Marroso took the witness stand and gave a detailed description of the interview from beginning to end. He testified, *inter alia*, that Marroso denied having possessed Ohio Turnpike bonds and did not recall having seen Green either in Nassau or Miami; that when questioned as to why he had been in Florida at the time here relevant, Marroso asked to be excused to consult his attorney, who had accompanied him to the F.B.I. office; and that, after consulting him, Marroso "came back and said that his attorney had instructed him not to answer any more questions, and that terminated the interview" (R. 444–446). In his opening remarks, the prosecutor, previewing the testimony which the government would offer, summarized the F.B.I. agent's description of the interview, including the manner in which it terminated (R. 26). Defense counsel moved unsuccessfully for a mistrial on three occasions, claiming that the prosecutor's opening comments and the agent's testimony were unduly prejudicial to petitioners (R. 26, 413–415, 448). In this Court, petitioners contend that the comments and testimony abridged their privilege against self-incrimination under the Fifth Amendment, impaired their right to counsel under the Sixth Amendment, and violated their statutory right not to testify under 18 U.S.C. 3481.[1] These contentions, we submit, are groundless.

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[1] Neither at trial nor before the court of appeals was there any contention by petitioner Samarin as to the propriety of the evidence in question. He now asserts for the first time (Pet. No. 471, pp. 13–17) that the evidence relating to the

We note first that, under familiar rules of evidence, the testimony in question was relevant, and was admissible for the purpose of giving the jury a complete and intelligible picture of the interview. Without that evidence, the jury would have been at a loss to understand the abrupt cessation of the questioning or might have drawn the erroneous inference that the interview had embraced other significant questions and answers about which the agent had not testified. As the court of appeals stated, "this was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and placing the whole in a true light" (331 F. 2d at 602). Thus, whether the evidence be viewed from the standpoint of "testimonial completeness" (see *Bryson* v. *United States,* 238 F. 2d 657, 661 (C.A. 9), certiorari denied, 355 U.S. 817), or "res gestae" (see *Rogers* v. *United States,* 334 F. 2d 83, 86 (C.A. 5)), it was appropriate to "permit the witness to tell his story in a natural way by telling all that happened at the time of the narrated incident including those details which give light and color to the story. * * * " McCormick, *Handbook of the Law of Evidence* (1954) 587.

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termination of the Marroso interview was prejudicial to his cause. We think it plain that if there was some infringement of Marroso's rights—which we do not concede—that was a personal matter relating only to Marroso. Particularly is this so where, as here, the judge carefully instructed the jury on numerous occasions that post-conspiracy statements were to be considered only against the respective declarants (R. 437, 447, 460, 618–619, 628).

The prosecutor's remarks and the agent's testimony in no way infringed petitioners' privilege against self-incrimination. In terminating the interview, Marroso did not invoke any constitutional privilege; nor was there any occasion for him to do so. He was not under arrest or under indictment at the time, and there is no indication that the agent was exerting pressure upon him to extract a confession. On the contrary, Marroso came voluntarily to the F.B.I. office, was accompanied by his attorney, and freely responded to a dozen questions before deciding to break off the dialogue. He was at liberty to discontinue the interview and to walk out of the office at any time and for any reason he chose, without resort to the Fifth Amendment and without regard to whether his answers might be self-incriminating. The prosecutor in no way suggested that Marroso had relied upon the Fifth Amendment, much less that there was anything inculpatory in his refusal to participate further in the interview. What was damaging about the agent's testimony was not the description of the way the interview ended, but rather the answers which Marroso gave to the first ten or twelve questions—particularly his assertions, in the face of strong contrary evidence, that he had not possessed Ohio Turnpike bonds and did not remember seeing Green either in Miami or Nassau. In these circumstances, we submit, there was no impairment of the Fifth Amendment privilege. The same considerations dispose of the contention under 18 U.S.C. 3481, which provides merely that a defendant's failure

to take the witness stand "shall not create any presumption against him."

Nor is there any basis for the conclusion that the decision below is at odds with the decisions of this Court of *Escobedo* v. *Illinois*, 378 U.S. 478, or *Massiah* v. *United States*, 377 U.S. 201, both of which dealt with the right to counsel under the Sixth Amendment. In *Massiah*, the Court held that incriminating statements elicited from the defendant by federal agents subsequent to his indictment and in the absence of his retained counsel could not, consistently with the Sixth Amendment, be introduced in evidence against him. In *Escobedo*, the Court applied the same rule to statements obtained through the interrogation of a defendant who had not yet been formally indicted, but who was in police custody and had been denied access to counsel. In the present case, Marroso was accompanied by his attorney and was free to consult with him at all times. Moreover, as we have noted, he was neither under arrest nor under indictment at the time of the questioning, and the record does not show that he had "become the accused," that "the purpose of the interrogation was to 'get him' to confess his guilt," or that "the police urged him to make a statement" (378 U.S. at 485).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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OCTOBER 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964